

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MARK A. KOCH,

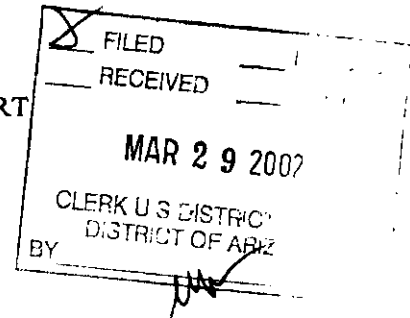
Plaintiff,

v.

SAMUEL LEWIS, et al.,

Defendants.

No. CIV90-1872-PHX-ROS (JBM)



MEMORANDUM OPINION AND ORDER

Plaintiff proceeded pro se for most of the history of this litigation, now well more than a decade old. Private counsel became involved in April, 2000. By that time, this court was well aware that the dynamics of the action had changed because of the continuing interactions between prison system and prisoner. What had happened during a drug test in 1990 was of far less moment than plaintiff's continued incarceration in a supermax facility because of his validation. By April 2000, that status was being attacked on both retaliation and due process grounds. As the trial date approached, plaintiff's counsel dropped the retaliation claim and other less significant claims, dismissed a number of defendants, and focused on the due process claim. And it was that claim that prevailed.

Plaintiff's counsel have now submitted a petition for fees, expenses and costs. They seek \$199,063.50 in fees, \$19,326.88 in expenses and \$4,941.95 in costs. The petition is granted.

On October 25, 2001, this court directed that the parties should respond to the application pursuant to the procedures set forth in LR 54.3 of the Northern District of Illinois. Defendant has failed to follow those procedures, apparently in the belief that the procedures were a form of fee negotiations and that the Arizona Department of Corrections had not authorized his counsel to

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engage in settlement discussions respecting fees. That belief (if that is what it was) is mistaken. LR 54.3 is intended to provide a means by which the parties can focus upon their actual disputes and provide the court with the information necessary for their resolution. But defendant has questioned various aspects of the fee petition, albeit in a very general fashion, and we will consider those contentions.

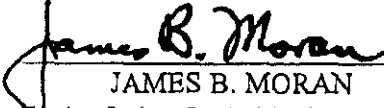
Defendant does not quarrel with the rates, which are statutorily capped at \$112.50 per hour, considerably below the market rate for most of the lawyers involved in this action. He does quarrel with some of the hours charged, contending that some are not "directly and reasonably incurred in proving an actual violation of the plaintiff's rights. ...," as required by 42 U.S.C. §1997e(d). He claims that the due process claim relating to supermax imprisonment came well after counsel became involved, but that is not so. It was a primary claim by April 2000. He also takes, we believe, an overly crabbed view of what is "directly and reasonably incurred." In undertaking and prosecuting the engagement to a successful conclusion, counsel had to determine their ability to undertake the engagement and then decide, with the concurrence of the plaintiff after a decade of pro se litigation, what claims should be advanced as the most likely successful. In all likelihood, the defendant benefitted from the arrival of counsel on the scene, as it resulted in a considerably streamlined case.

That does not mean, however, that the hours expended should necessarily have been less. Discovery came almost entirely after April, 2000; the difficulties and inconvenience of representing a prisoner in an isolated supermax facility are manifest; and the issues, requiring a fresh look in light of Sandin v. Conner, 515 U.S. 472 (1995), were complex. Even from the court's own perspective, it was a labor intensive effort. We do not know the hours expended by

defendant's counsel (although that information is required by LR 54.3). If they record hours expended, however, we would be surprised if those hours were substantially less than those expended by plaintiff's counsel (although we would expect them to be less because plaintiff had the burden of proof and defendant's counsel had far easier access to their clients).

Defendant also contends that time engaged in clerical tasks is not recoverable. But a view of the time records indicates that defendant's complaint relates to recovery for paralegal time - and that surely is recoverable, and at normal rates so long as they do not exceed \$112.50 per hour. Defendant did have a legitimate objection to undocumented expenses and costs, but plaintiff's counsel has now provided copies of the invoices. He may have been entitled to more detail respecting Daniel J. Pochoda, but that too has now been supplied.

This case is now on appeal and, therefore, the entitlement of plaintiff's counsel to fees, expenses and costs has not been finally determined. For now, however, plaintiff is the prevailing party, and his counsel are awarded a total amount of \$223,332.33.


JAMES B. MORAN
Senior Judge, U.S. District Court

March 28, 2002.

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